United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1130

To be argued by Stephen R. LaMantia
Time requested for argument 20 minutes

B
mi
servi

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1130

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LOUIS OLIVER, MARY JEAN ASKEW,
ELGIN C. COOK,

Defendants-Appellants.

BRIEF OF APPELLANT, MARY JEAN ASKEW

STEPHEN R. LAMANTIA
Attorney for Appellant,
MARY JEAN ASKEW
816 Prudential Building
Buffalo, New York 14202
Tel. No. (716) 856-1192

TABLE OF CONTENTS

STATEMENT OF THE CASE

This is an appeal by the defendant, Mary Jean Askew, from a judgment of conviction entered on March 1, 1976 in the United States District Court for the Western District of New York (Curtin, C. J.). The judgment was entered upon a jury verdict returned on January 8, 1976 convicting the defendant-appellant of conspiring to commit offenses against the United States by knowingly and with intent to defraud, devising a scheme and artifice to obtain moneys from the New York State Unemployment Insurance Fund by means of the Post Office Department of the United States and/or the U. S. Postal Service and in furthering such scheme or device by using false and fictitious names and addresses in violation of 18 U.S.C. § 371, as charged in counts 1, 13 and 58 of the indictment and further finding the defendant-appellant, Mary Jean Askew, guilty of using the mails in furtherance of a scheme and artifice to defraud in violation of 18 U.S.C. §§ 1341 and 2 as charged in counts 2, 3, 10, 14, 22, 25 and 59 of the indictment. Counts 21 and 24 of the indictment charging the defendant-appellant with mail fraud in violation of 18 U.S.C. §§ 1341 and 2 were dismissed by the Court on motion of defense counsel at the close of the evidence in the case. Appellant was sentenced to the custody of the Attorney General for a period of Three (3)

years on the convictions under counts 1, 2, 3, 10, 13, 14, 22, 25, 58 and 59 of the indictment, which sentence was on each count of the indictment, to run concurrently with each other and concurrently with a sentence defendant-appellant was presently serving for a prior conviction for perjury.

STATEMENT OF THE FACTS AND THE TRIAL

On December 17, 1973, defendant-appellant, Mary Jean Askew, was indicted by a Federal Grand Jury sitting in the Western District of New York, together with seven additional co-defendants, in a multi-count indictment charging various violations of 18 United States Code, Sections 371, 1341, 1342 and 2. That indictment was subsequently replaced by a superseding indictment adding an additional co-defendant and additional violations of the above statutes. Defendant-appellant, Mary Jean Askew, was named in Counts 1, 2, 3, 10, 13, 14, 21, 22, 24, 25, 58 and 59 of the superseding indictment (CR 74-244) which contained a total of 71 counts against nine separate defendants.

The case came on for trial on December 9, 1975. At that time, defendant-appellant, Mary Jean Askew, was in the custody of the Attorney General serving a sentence of imprisonment for perjury on a separate Federal Court conviction. She was returned in the custody of the U. S. Marshals from Alderson, West Virginia so that she could participate in the instant trial. Prior to trial, one of the defendants, Cainetta

Raspberry, was severed from the case. After a jury had been impanelled and prior to commencement of opening statements, two other defendants, George Raspberry and Rosa Bell McClendon, entered pleas of guilty, The trial commenced with opening statements and testimony on December 17, 1975.

Early in the trial on December 22, 1975, it was brought to the Court's attention that defendant-appellant, Mary Jean Askew, had a serious health problem. Defense counsel advised the Court that Ms. Askew was having difficulty breathing and wanted to be taken to the hospital. (TR.507-508). At that time, the Government witnesses had covered all counts of the indictment relating to Ms. Askew, except two counts which came later in the indictment and it was felt that the testimony going in at that point in the trial related to the other co-defendants and therefore there was no real necessity for Ms. Askew to be present during such testimony. The U. S. Attorney acknowledged that defendant-appellant had a serious case of asthma and had been breathing heavily from time to time. (TR.509). The Court thereupon excused Ms. Askew, advising the jury that she was troubled by asthma and that the testimony being taken at that time concedely did not relate to her case. (TR.510).

On December 23, 1975, the trial resumed. At that time, defendant-appellant was confined to Meyer Memorial Hospital in Buffalo, New York for examination (TR.653). The U. S. Attorney presenting evidence at the trial advised the Court that he would not have any witnesses relating to the defendant-appellant that

morning. (TR.654). Later that day, the Government called as a witness, Joseph Ruocco, an employee of Regiscope Distributors, for the purpose of entering into evidence numerous photographs of various defendants cashing unemployment checks allegedly obtained by the scheme outlined in the indictment. Ten of these photographs (Exs. 24 through 33) pertained to defendant, Mary Jean Askew. Defense counsel objected to any photographic identification of the defendant, Mary Jean Askew, in her absence and the Court advised the U. S. Attorney that it would be best that defendant, Mary Jean Askew, be present if there was to be any testimony along that line. (TR.708). The Court further advised the jury that Ms. Askew had been excused by the Court due to her asthmatic condition and that we would have to wait until she could be present in Court before further testimony could be taken from Mr. Ruocco. (TR.718-719).

On December 29, 1975, the trial resumed and the Government recalled Mr. Ruocco. At that time, Ms. Askew was still hospitalized. Counsel for Ms. Askew noted her absence, advised the Court that neither defendant nor counsel waived her presence, and objected to any further testimony from Mr. Ruocco in defendant's absence. (TR.765). The Court overruled defendant's objection and stated that Mr. Ruocco's testimony "seems to me to be very technical in nature..." and that "We had Mr. Ruocco come back some distance and I think it is important that he be permitted to testify today." (TR.766). Defense counsel once again objected to Mr. Ruocco's testimony

and the Court overruled the objection. (TR.775-776).

When trial resumed on December 30, 1975, Ms. Askew was still confined to the hospital and her defense counsel again noted his objection to continuing the trial in her absence. (TR.897). On this date, the Government presented testimony from Hugh Sang, an expert witness called for the purpose of linking various defendants, including Ms. Askew, to Government exhibits through handwriting analysis. At this point, counsel for Ms. Askew objected to Mr. Sang testifying without Ms. Askew being present to hear such testimony and assisting counsel in cross-examining the witness (TR.1004). Defense counsel advised the Court that Mr. Sang's testimony was very vital and crucial to the Government's case against Ms. Askew insofar as connecting her with Government documents and exhibits in the case and that he felt that as a defendant she had a right to hear such testimony personally and that she had not waived her presence. (TR.1005). The Court overruled the objection and allowed Mr. Sang to testify. (TR.1005).

At the conclusion of Mr. Sang's direct examination, counsel for Ms. Askew made a motion for a mistrial based on the absence of Ms. Askew during the testimony of the Government's expert witness, Mr. Sang. (TR.1059). Counsel noted that he had not seen or talked to defendant-appellant since she was hospitalized one week previously and that he could not intelligently cross-examine the Government's expert without benefit of consulting with the defendant. Counsel further claimed that

defendant-appellant had been denied her Sixth Amendment to confront witnesses giving testimony against her. (TR.1060). The Court noted that defense counsel had "clearly indicated his objection to the procedure" (TR.1061) but denied the motion for a mistrial (TR.1062). The witness was ordered to return the next court session for purposes of cross-examination. When the witness returned on January 5, 1976, defendant-appellant was present, as she was throughout the remainder of the trial, including the verdict.

ARGUMENT
POINT I

It was error for the trial to continue in the absence of the defendant-appellant.

The nature of the proof against the defendant-appellant, Mary Jean Askew, was, as the Assistant United States Attorney candidly admitted in his summation "circumstantial" in nature. (TR.1239-1240) The only Government witnesses connecting Ms. Askew with the commission of the offenses charged in the indictment were Joseph Ruocco who testified concerning regiscope photographs of an individual purportedly the defendant-appellant, cashing unemployment checks and Hugh Sang, a handwriting expert, who stated his opinion that Ms. Askew was the writer on various claim forms, pay orders and endorsements on certain unemployment checks that were Government exhibits in the case. Ms. Askew, who had taken ill during the course of the trial, was hospitalized and not in the courtroom for the entire testimony of Mr. Ruocco and for the entire direct examination of Mr. Sang. At no time did defendant-appellant, Mary Jean Askew, ever waive her presence in court, nor did her counsel waive her presence. In fact, the testimony of each of these witnesses came in over objection of defense counsel. (TR.765, 775-776, 897 and 1004-1005). In each instance, the Court overruled the objections (TR.766 and 1005) and allowed the testimony. In addition, defense counsel made a motion for a mistrial based upon a violation of defendant-appellant's Sixth Amendment right to be confronted with the

witnesses against her (TR.1059-1060). The Court similarly denied the motion for a mistrial. (TR.1062).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. Lewis v. United States, 146 U.S. 370 (1892); Illinois v. Allen, 397 U.S. 337, 338 (1970), rehearing denied 398 U.S. 915. It is clear from the record that defendant-appellant, who became ill during the course of the trial, was not present in the courtroom for all of Joseph Ruocco's testimony and for the entire direct examination of Hugh Sang.

This Court has previously held that the right to be present at one's trial is a personal right that may be waived by a defendant. United States v. Crutcher, 405 F.2d 239, 243 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969). However, at no point, did defendant-appellant waive her presence during any crucial stage of the trial relating to evidence against her. True, defendant-appellant was excused by the Court due to illness at a time when the Government was presenting evidence against other co-defendants unrelated to any count of the indictment directly concerning Ms. Askew. (TR.510 and 654). However, when the Government sought to introduce the testimony of witnesses such as Mr. Ruocco and Mr. Sang, counsel for defendant-appellant

clearly indicated on the record his objection to their testimony in defendant-appellant's absence and that neither counsel nor defendant-appellant waived her presence. (TR.765, 775-776, 897, 1004-1005).

Defendant's absence due to illness was not the kind of voluntary absence which permits a trial to proceed. There certainly was no "escape or absconding of the defendant" such as in Cross v. United States, 325 F.2d 629 (1963); nor was there a "deliberate failure to appear without a reason" such as in Cureton v. United States, 396 F.2d.671 (1968); nor was there any "noisy, disorderly, and disruptive behavior" such as in Illinois v. Allen, supra. In this instance, defendant-appellant's absence from the courtroom due to illness came at a time when the judge and the jury were engaged in open court in proceedings directly bearing upon the decisional processes of the jury. Indeed, defendant did recover sufficiently from her physical ailments to return to the courtroom before the conclusion of the Government's presentation of evidence in the case and she was continuously present thereafter through to the jury's verdict of conviction.

With respect to the testimony of Government witness, Joseph Ruocco, the Court noted in overruling counsel's objection to his testifying in defendant-appellant's absence that his testimony was "very technical in nature" (TR.766) and that "We had Mr. Ruocco come back some distance and I think it is important that he be permitted to testify today." (TR.766). Mr. Ruocco's testimony was the basis for the introduction of

ten photographs (Exhibits 24 through 33) which directly linked defendant-appellant to cashing unemployment checks allegedly obtained by means of the fraudulent scheme outlined in the indictment. As such, the testimony was more than merely "technical" in nature and extremely vital to the Government's case against Ms. Askew. Furthermore, the fact that the witness had "come back some distance" to testify should not have been a determinative factor. It has been held that the constitutional right of confrontation and cross-examination to the extent guaranteed by the Sixth Amendment cannot be sidestepped because it happens to be convenient for one of the parties. Holman v. Washington, 364 F.2d 618, 623 (5th Cir. 1966).

Likewise, the testimony of the Government's handwriting expert, Hugh Sang, was crucial to the Government's case against defendant-appellant since it was the sole means by which defendant, Mary Jean Askew, was linked to numerous Government exhibits such as claim forms, pay orders and endorsements on checks. Once again, the direct examination of Mr. Sang was in defendant-appellant's absence, over the objection of defense counsel, and with no waiver on the part of defendant-appellant or her counsel.

It should be noted at this point that at all times during the trial, defendant-appellant was in the custody of the Attorney General, having been returned from federal prison in Alderson, West Virginia where she was serving a term of imprisonment for a prior conviction. This is important since there is authority in this Circuit for the proposition that a defendant in custody does

not have the power to waive his right to be present at his trial. United States v. Crutcher, supra at 243. See also Diaz v. United States, 223 U.S. at 455 (dictum).

Despite objection of counsel for defendant-appellant, the Court permitted the testimony of these two witnesses. The Court also overruled defense counsel's motion for a mistrial following Mr. Sang's direct examination. (TR.1061-1062).

The standard by which to determine whether reversible error occurred as a result of defendant-appellant's absence during the proceedings against her is not whether she was actually prejudiced, but whether there was any reasonable possibility of prejudice. Wade v. United States, 441 F.2d 1046 (D.C. Cir. 1971). Indeed, it has been held that since the absence of a criminal defendant during the course of proceedings which are critical to the trial process carries constitutional overtones, appellant is under no burden to show actual prejudice for it will be presumed. Ellis v. State of Oklahoma, 430 F.2d 1352, 1354 (10th Circ. 1970), cert. denied, 401 U.S. 1010 (1971).

It is submitted that the prejudice in allowing Messrs. Ruocco and Sang to testify in defendant-appellant's absence is patent. As the Tenth Circuit has held, a court can let stand no conviction where the defendant was not present at all stages of the proceedings unless the record completely negatives any reasonable possibility of prejudice arising from such error. Jones v. United States, 299 F.2d 661, 662 (10th Cir.), cert. denied, 371 U.S. 864 (1962). See also, United States v. Baca,

494 F.2d 424, 426 (10th Cir. 1974). The record and the verdict in this case clearly manifest the prejudice that resulted from the Court's error in allowing the testimony of these two witnesses to come in at a time when the defendant was absent from the courtroom. Were she present, defendant could have advised her counsel of facts and circumstances relating to her presence and whereabouts at the times the photographs were taken. She could also have advised counsel, who was not present when her handwriting exemplar was taken, as to circumstances surrounding this procedure and also the physical characteristics of her handwriting and printing.

Albeit the trial was a long and complicated one, involving multiple defendants and numerous charges. However, the reason for the defendant's absence during part of the trial - physical incapacity requiring hospitalization - was certainly a legitimate one beyond defendant's control. To allow the trial to continue in her absence, including admission of vital testimony directly relating to her involvement in the offenses charged, was sacrificing defendant-appellant's basic constitutional rights and guarantees on the altar of expediency.

It is respectfully submitted that for the above reasons, the conviction of defendant-appellant must be reversed.

POINT II

There is no legally sufficient proof in the record that defendant-appellant was guilty of violating either the federal mail fraud statute or conspiring to violate such statute.

In Counts 2, 3, 10, 14, 22, 25 and 59 of the indictment, defendant-appellant, Mary Jean Askew, is charged with violating the provisions of the federal mail fraud statute 18 U.S.C. Sections 1341 and 2. The applicable parts of the mail fraud statute provide as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.
> 18 U.S.C. § 1341 (Emphasis added).

The Government initially charged in the aforesaid counts of the indictment that defendant-appellant placed or caused to be placed in the mails a certain certification that she was still unemployed and entitled to insurance benefits. These Forms LO406 were variously referred to during the course of the

trial as "Claims for Benefit Payment" or "pay orders". As the testimony came in through William Julius, the Government's key witness, it became apparent that these Form LO406's were never mailed by a claimant but rather were signed personally at the Unemployment Office. Thereafter, as part of the intra-office procedure of the New York State Department of Labor, the forms were mailed by a department employee to their Albany office where checks were then issued. (TR.115 through 118, 249, 438-440, 446-447).

At the close of the Government's case, counsel for defendant-appellant moved for a judgment of acquittal under FRCP29(a) on the basis that there was no showing defendant had mailed or caused to be mailed any of these Forms LO406 as charged in various counts of the indictment. (TR.1129-1131). The Assistant U. S. Attorney candidly admitted there was no evidence defendant ever mailed Form LO406.1 (TR.1131) but argued that she had "caused" the form to be mailed. (TR.1132-1133). The Court initially reserved decision on the motion (TR.1135) but later denied it. (TR.1186).

Surprisingly, however, after counsel for defendant-appellant had made similar arguments to the Jury in his summation, the Court sua sponte reconsidered defendant's motion to dismiss and thereafter dismissed counts 21 and 24 of the indictment charging the defendant-appellant with mail fraud violations. (TR.1379). Thus, the main thrust of the Government's case against defendant-appellant on the remaining mail fraud counts was that

she and others "devised and intended to devise a scheme and artifice to defraud he New York State Unemployment Insurance Fund of unemployment insurance benefits by filing false and fraudulent claims for such benefits using false or fictitious names ...." and that the State of New York thereafter mailed to defendant-appellant unemployment insurance checks in such assumed name which checks were endorsed and cashed by defendant-appellant. The proof as it came in, however, showed that co-defendants, Elgin C. Cook and George Raspberry were the sole architects of the scheme alleged in the indictment and that no one else was involved. (TR.612). Indeed, George Raspberry pleaded guilty prior to trial and testified as a Government witness during the trial. At no point during his testimony did Mr. Raspberry link defendant Mary Jean Askew with any fraud under the indictment.

Furthermore, there was no evidence offered by the Government establishing that defendant, Mary Jean Askew, ever received any checks through the mail. The only evidence on this point was that various checks were addressed to 83 Brunswick Blvd., Buffalo, New York, defendant's home. However, this also was an address used by co-defendants, Elgin C. Cook, Nathaniel Askew and Robert Allen Askew. Furthermore, another government witness, Mamie Calhoun, also testified she lived at that address during the time period covered by the indictment. The proof was once again circumstantial that defendant-appellant ever received any unemployment checks via the mail.

If the only remaining link of defendant-appellant to an alleged mail fraud scheme was that unemployment checks were allegedly mailed by New York State, it is submitted that this is an insufficient basis for invoking the federal mail fraud statute. In the most recent Supreme Court decision on point, United States v. Maze, 414 U.S. 395 (1974), it was held that the defendant's conduct did not fit within the confines of the statute even though the mail was in fact used as a part of the scheme. As the Court noted in Maze,

> Congress could have drafted the statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be "for the purpose of executing such scheme or artifice ...." 414 U.S. at 405.

It is submitted that in this case there was insufficient proof that any alleged mailings of checks were related to a scheme devised by the defendant-appellant such as to bring her conduct within the purview of the federal mail fraud statute.

With respect to Counts 1, 13 and 58, which charge the defendant-appellant and others with conspiring to violate the mail fraud statutes, it is submitted that there is not legally sufficient proof in the record on which a conviction under 18 U.S.C. § 371 can stand as against defendant-appellant Mary Jean Askew. An examination of the overt acts alleged under these counts fails to specify facts sufficient to support the conspiracy theory of the Government.

At the close of evidence in the case, when a motion to dismiss was made under Rule 29(a), the following colloquy took place between the Court and counsel for the Government:

THE COURT:

> Excuse me. Let me do this a different way. Mr. Williams, what evidence do you have that there was a conspiracy here, that is, a plan on the part of Mary Jean Askew? What I am thinking of, I am thinking of the testimony of Mr. Raspberry who told us that he went with Mr. Cook into various places and they got numbers and they did this and that. I cannot recall him saying anything about Mary Jean Askew.

MR. WILLIAMS:

> There is no testimony with respect to, - nobody testifies that there was an actual conspiracy existing or there was an agreement existing. Again, simply by the overt acts as to what each one of them is doing, one is making a claim, the other is verifying the employment, checks are issued, some other defendants are second endorsing checks and that is the pattern throughout. (TR.1144-1145).

Furthermore, with respect to the conspiracy charge alleged in Count 13, the United States Attorney stated that there was evidence which showed participation between defendants Cook and Toliver, but when questioned by the Court as to whether there was any evidence as to the participation of Mary Jean Askew (TR.1174), the prosecutor was forced to admit "No, not with Mary Jean Askew ...." (TR.1175). When pressed on this point, the

record shows the following discussion:

THE COURT:

What is the connection between Toliver and Askew?

MR. WILLIAMS:

Your Honor, what the situation is is this, that there are several conspiracies charged. It is not one overall conspiracy.

THE COURT:

I am just looking at this particular conspiracy, Count 13.

MR. WILLIAMS:

All right. I have no proof that Elgin Cook, - I have no proof that Mary Jean Askew and Louis Toliver conspired together, but again I submit that there is no requirement that each conspirator know the other conspirator as long as they know the overall scheme.

THE COURT:

You have to prove something circumstantially. Do you show any tie-in through documents?

MR. WILLIAMS:

Not between Mary Jean Askew and Louis Toliver, no.

THE COURT:

Why did you charge them in one conspiracy then?

MR. WILLIAMS:

Well, for the simple reason it is my understanding of the law that it is not a requirement to show that each defendant knew the other defendant in a conspiracy.

THE COURT:

No, but you had to have some common purpose, scheme, plan. You just cannot say "filing of unemployment insurance claims". In the claims themselves is there anything inherent in the claims which points to the participation of Toliver, Askew and Cook all in these forms that you have here?

MR. WILLIAMS:

Yes.

THE COURT:

Explain it to me.

MR. WILLIAMS:

What is inherent in these claims is that each of the defendants, Toliver, Askew, McClendon, and Raspberry filed claims alleging that they worked for Cook Auto Care during certain periods of time. They filed those claims using false and

fictitious names. The defendant Elgin Cook verified that each one of those defendants under the false and fictitious name worked for him. There is the connection.

THE COURT:

Including Toliver?

MR. WILLIAMS:

Including Toliver.

THE COURT:

All right, so that the connecting point here is Cook's Auto Care then, is that your point?

MR. WILLIAMS:

Elgin Cook and Cook's Auto Care, that is correct.

THE COURT:

All right. We find out at least your point of view. (TR.1175-1177).

From the foregoing, it appears that the Government's theory of conspiracy centers on the name of the employer and the co-defendant Elgin Cook. If this be so, then it is submitted that the conspiracy charges cannot stand.

A criminal conspiracy requires (1) an object to be

accomplished, (2) a plan or scheme embodying means to accomplish that object, (3) an agreement or understanding between two or more or the defendants whereby they become definitely committed to cooperate for the accomplishment of an objective by the means embodied in the agreement or by any effectual means. United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973). It is essential that the conspiracy have a single objective with all the conspirators working toward that end.

In the instant case, there is no direct evidence of actual agreement or understanding between defendant, Mary Jean Askew, and any one of the other alleged co-conspirators. The Government seeks to establish the conspiracy by circumstantial evidence. However, the only common bond between the alleged conspirators under the Government's theory is Elgin Cook and he is alleged in the indictment to have worked independently with each of the co-conspirators towards a specific and limited end.

Finally, in no instance alleged as an overt act in the conspiracy counts was there proof that defendant-appellant ever mailed any form or document, nor was there any proof she caused the mails to be used in furtherance of a fraudulent scheme. If there were any conspiracy, and we argue there was none, there has been a complete and utter lack of proof in this case that the conspiracy was to violate the federal mail fraud statutes.

CONCLUSION

For all of the reasons set forth above, the convictions

of defendant-appellant Mary Jean Askew should be reversed.

Buffalo, New York

April 27, 1976

STEPHEN R. LAMANTIA, ESQ.
Attorney for Appellant
Mary Jean Askew
816 Prudential Building
Buffalo, New York 14202
Tel: (716) 856-1192

SRL/tc